MOTION FILED
APR 22 1991

No. 90-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

—vs.—

HARVEY G. MORTS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD H. BROWN, JR.
Counsel of Record
KENNETH H. VOLK
HARRY A. GOTIMER
KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Attorneys for the Maritime Law Association of the United States, Applicant for Leave to File Brief as Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1487

In the Matter of:

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,

Petitioner,

—VS.—

HARVEY G. MORTS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari filed by Three Buoys Houseboat Vacations U.S.A., Ltd. Petitioner has given consent, but Respondents have not, and leave to file must be sought pursuant to Rule 37.4.

NATURE OF APPLICANT'S INTEREST

MLA has a very strong interest in the disposition of this case. It is a nationwide bar association founded in 1899, having a membership of about 3700 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, boatowners, charterers, cargo owners, shippers, forwarders, terminal operators, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and others.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for its discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the ninety years of existence, has sponsored a wide range of legislation dealing with maritime matters and has also cooperated with Congressional committees in the formulation of other maritime legislation.[1]

---

1 E.g., Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing

MLA believes uniformity in maritime law is of great importance. This concern has been repeatedly expressed by its membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken to persuade Congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted on April 25, 1975.[2] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[3]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including five accepted by the United States Supreme Court.[4]

It is the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted* in 6 Benedict on Admiralty, Doc. No. 3-4 at 3-34.1-78.2 (7th ed. 1988), see C.F.R. ch. 1, subch, D, Special Note at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073; Shipowner's Limitation of Liability Bill, H.R. 277, 99th Cong., 1st and 2nd Sess. (1985, 1986).

2 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

3 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

4 *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed. 2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Sisson v. Ruby*, 497 U.S. _____, 110 S.Ct. 2892 (1990). For a more complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

Such a situation exists in this case. The Eighth Circuit Court of Appeals has limited admiralty and maritime jurisdiction too narrowly, without regard to material considerations which other circuit courts and this court have thought relevant. Moreover, in failing to follow *Richardson v. Harmon*, 222 U.S. 96 (1911), it would also have the effect of denying a vessel owner his right to seek limitation of liability, which can properly be sought only in a federal district court. Both aspects of the *Three Buoys* decision would adversely affect uniform interpretation and application of the admiralty and maritime law.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES.

MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, necessarily is different from those of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. MLA can therefore most effectively treat the need for a decision by this Court which would foster national uniformity and clarity on the issues presented.

Date: April 22, 1991

Respectfully submitted,

/s/ RICHARD H. BROWN, JR.
RICHARD H. BROWN, JR.
Counsel of Record
KENNETH H. VOLK
HARRY A. GOTIMER
KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Attorneys for the Maritime Law Association of the United States, Applicant for Leave to File Brief as Amicus Curiae

QUESTIONS PRESENTED

1. Whether admiralty jurisdiction exists by reason of a collision between a commercial service vessel and a houseboat on the Lake of the Ozarks.

2. Whether, if such admiralty jurisdiction does not exist, the district court nevertheless has jurisdiction to adjudicate the vessel owner's rights by virtue of the Limitation of Liability Act, 46 U.S.C. App. §§ 181 *et seq.*

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Authorities iv

Brief in Support of Petition for Writ of Certiorari ... 1

STATEMENT 1

SUMMARY OF ARGUMENT 5

ARGUMENT 5

A. In this case of a collision involving a commercial vessel, the Lake of the Ozarks, formed from the navigable Osage River by a dam built pursuant to federal government authorization with significant reservations of federal power concerning navigation, should be considered a navigable waterway to which admiralty jurisdiction applies, even though the dam bars navigation continually afloat directly from the lake to other states 5

B. Even if this collision on the Lake of the Ozarks does not otherwise fall within admiralty jurisdiction, a complaint seeking vessel owner's limitation of liability with respect thereto is within the district court's jurisdiction by virtue of the Limitation of Liability Act, authority for which is grounded in both the admiralty legislative power derived from the admiralty jurisdictional grant and the Commerce Clause 11

PAGE

CONCLUSION 15

APPENDIX TABLE OF CONTENTS

46 U.S.C. § 184..... 1a

46 U.S.C. § 189..... 1a

TABLE OF AUTHORITIES

Cases: PAGE

Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975) 10

Butler v. Boston Steamship Co., 130 U.S. 527 (1889) 12, 13

Chapman v. United States, 575 F.2d 147 (7th Cir. 1978) (*en banc*), *cert. denied*, 439 U.S. 893 (1978) . 10

Economy Light Co. v. United States, 256 U.S. 113 (1921) 7

Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972) 14

Ex parte Boyer, 109 U.S. 629 (1884) 10

Jackson v. Steamboat Magnolia, 20 How. 296 (1857). 6, 10

Kaiser Aetna v. United States, 444 U.S. 164, (1979).. 3, 8

Livingston v. United States, 627 F.2d 165 (8th Cir. 1980) *cert. denied*, 450 U.S. 914 (1981) 3, 9

Loc-Wood Boat & Motors v. Rockwell, 245 F.2d 306 (8th Cir.1957) 4

Norwich Company v. Wright, 80 U.S. (13 Wall.) 104 (1871) 11, 12

Richardson v. Harmon, 222 U.S. 96 (1911) 4, 5, 14

Sisson, In the Matter of, 867 F.2d 341 (7th Cir. 1989) 4

Sisson v. Ruby, 497 U.S. ____, 110 S. Ct. 2892 (1990) 4

The Daniel Ball, 10 Wall. 557 (1870)..... 6

The Hamilton, 207 U.S. 398 (1907).....12, 13

The Montello, 20 Wall. 430 (1874)..... 7

The Propeller Genesee Chief v. Fitzhugh, 12 How. 443 (1852) 6, 10

U.S. v. Appalachian Power Co., 311 U.S. 377 (1940) 7

PAGE

Statutes:

28 U.S.C. § 1331 3

United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2038, 2071-2073 2

Limitation of Liability Act, 46 U.S.C. §§ 181 *et seq* 3, 4, 11, 13, 14

Rules:

Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F. 12

Miscellaneous:

1 S. Friedell, *Benedict on Admiralty* (7th ed. 1988), § 171, n.69 (1991 Supp.) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1487

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,

Petitioner,

—VS.—

HARVEY G. MORTS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Three Buoys Houseboat Vacations U.S.A., Ltd.

STATEMENT

The Osage River in the State of Missouri is a tributary of the Missouri River and for the material part of its length has long been recognized as part of the navigable waters of the United States. The U.S. Army Corps of Engineers (Army Corps) authorized a private utility company to build

and operate a lockless hydroelectric dam (Bagnell Dam) pursuant to a license issued by the Federal Energy Regulatory Commission (FERC). Bagnell Dam is located some 82 miles upstream from where the Osage joins the Missouri. The impoundment of the Osage River's waters by the dam created the Lake of the Ozarks, a very large body of water whose main channel is navigable for some 89 miles upriver from the dam. Thus the total navigable length, both above and below the dam, is about 171 miles (82 plus 89).

The FERC license specifically declares the Osage River to be a navigable waterway of the United States affecting the interests of interstate or foreign commerce, and specifically reserves to the United States the rights to require removal of the dam, to construct necessary facilities for navigation, to use all water necessary for navigation, and to terminate the license.

The Lake of the Ozarks is capable of sustaining commercial shipping, which takes place in the form of carriage of passengers and goods for hire.

The Army Corps has retained authority concerning permitting any obstruction to navigation in the lake.

The United States Coast Guard inspects passenger excursion vessels and has exclusive responsibility for enforcement of Federal inspection and other statutes applicable to non-recreational vessels. Under an agreement between the Coast Guard and the State of Missouri, there is a sharing of responsibilities concerning navigation in the lake, with the Coast Guard delegating certain functions to the State.

It appears that the applicable navigational Rules of the Road on the lake are the United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2038, 2071-2073.

Three Buoys Houseboat Vacations U.S.A., Ltd. (Three Buoys) owned a commercial service vessel. On August 2, 1987, while returning from a commercial service job on the Lake of the Ozarks, the vessel collided with a houseboat. The respective parties herein have alleged that the collision was

caused by negligence on the part of the houseboat or the service vessel entailing violations of the Rules of the Road governing navigation.

Three Buoys filed a complaint for exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. App. § 181 *et seq.* Claimants answered and filed motions to dismiss the complaint for lack of subject matter jurisdiction.

The district court granted those motions on June 27, 1988. It held there was no admiralty jurisdiction because the Bagnell Dam prevents passage of boats from the lower Osage River into the lake and therefore the lake is presently incapable of sustaining commercial shipping, i.e., interstate navigation. (A-33)[1] It held there was federal question jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1337, over this limitation of liability proceeding which arises under an Act of Congress regulating commerce (A-35). However, it concluded that the Limitation of Liability Act only applied to events giving rise to claims occurring on waters which are "navigable" for purposes of admiralty jurisdiction and therefore dismissed the limitation complaint for failure to state a claim under the Limitation of Liability Act. (A-37, 38)

On appeal the Eighth Circuit affirmed the dismissal. Referring to *Livingston v. United States,* 627 F.2d 165 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), which in turn had interpreted this Court's observations on "navigability" in relation to the purpose for which it is defined in *Kaiser Aetna v. United States,* 444 U.S. 164, 171-172 (1979), the Eighth Circuit held there was no federal admiralty jurisdiction because such jurisdiction required contemporary navigability in fact by interstate or foreign commercial shipping (A-14, 15). Contrary to the district court, it opined there was no federal question jurisdiction because it found no precedent for such jurisdiction under 28 U.S.C. §§ 1331 and 1337 in connection with the Limitation of Liability Act (A-16); it

---

1 References (A-) are to Petitioner's Appendix

asserted that the cause of action arose under state rather than federal law and the Limitation of Liability Act has never extended federal court jurisdiction (A-17, 18). Finally, it concluded that "because the reach of the Limitation of Liability Act is coextensive with admiralty," limitation would not apply in any event because the lake is not navigable in fact for purposes of admiralty jurisdiction (A-19-22).

On the latter points the Eighth Circuit relied in considerable part on the decision in *In the Matter of Sisson*, 867 F.2d 341 (7th Cir.1989), *rev'd on other grounds sub. nom. Sisson v. Ruby*, 497 U.S. ____, 110 S. Ct. 2892 (1990). It did not mention *Richardson v. Harmon*, 222 U.S. 96 (1911), which held that a vessel owner was entitled to seek limitation of liability with respect to a non-maritime tort, by virtue of 46 U.S.C. § 189 (Appendix hereto).

This Court vacated the Eighth Circuit's decision and remanded the case for consideration in light of this Court's opinion in *Sisson v. Ruby*, 497 U.S. ____, 110 S. Ct. 2892 (1990).

On remand the Eighth Circuit, emphasizing the lack of an "interstate" connection (A-7), found nothing in *Sisson* which persuaded it to alter its judgment.[2] It went on to reiterate the views expressed in its first opinion and reaffirm dismissal of the limitation complaint, overruling its earlier decision holding the same lake navigable, *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957).

---

2 It is of interest to note that one leading text, in discussing the *Three Buoys* remand, thought it unlikely that this Court would "jettison the locality requirement in silence" and has suggested a "more likely explanation" of the *Three Buoys* remand is that this Court "wanted the Court of Appeals in *Three Buoys* to consider the question not addressed in *Sisson*, that is, whether the Limitation of Liability Act applies to claims that are outside the admiralty jurisdiction provided by 28 U.S.C. § 1333." 1 S. Friedell, *Benedict on Admiralty* (7th ed. 1988), § 171, n. 69 (1991 Supp.).

SUMMARY OF ARGUMENT

A. By narrowly focusing solely on a rigid requirement of present navigability in interstate commerce as being a *sine qua non* for admiralty jurisdiction the Eighth Circuit in *Three Buoys* has unjustifiably limited admiralty jurisdiction. We submit it has done so as a result of misapplying or disregarding prior decisions and has taken a position diverging significantly from that of other circuits. We find no decision of this Court barring admiralty jurisdiction over state waters. In any event, this case involves a collision of a commercial vessel on a large lake formed by damming a navigable river, with the Federal Government expressly retaining extensive authority and jurisdiction. The waters of the lake are used for commerce and, in the circumstances here present, this collision falls within admiralty jurisdiction.

B. Even if there were no admiralty jurisdiction, the Limitation of Liability Act, enacted to encourage both shipping and shipbuilding, is applicable to non-maritime torts. In the circumstances of this collision and the limitation proceedings, the district court has jurisdiction in consequence of Congressional legislative power and such authorities as *Richardson v. Harmon*, 222 U.S. 96 (1911).

ARGUMENT

A. In this case of a collision involving a commercial vessel, the Lake of the Ozarks, formed from the navigable Osage River by a dam built pursuant to federal government authorization with significant reservations of federal power concerning navigation, should be considered a navigable waterway to which admiralty jurisdiction applies, even though the dam bars navigation continually afloat directly from the lake to other states.

This Court, in a variety of cases, has had occasion to define or characterize navigable waters. The grant of admiralty jurisdiction to the district courts was once thought to be

confined to tide waters but, in *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443 (1852), that requirement was abandoned. The case concerned a collision on one of the (non-tidal) Great Lakes to which admiralty and maritime jurisdiction had been extended by act of Congress. The act was held constitutional, the Court stating that jurisdiction depends on "the navigable character of the water, and not the ebb and flow of the tide." *Id.* at 457.

Jackson v. Steamboat Magnolia, 20 How. 296 (1857) held there was admiralty jurisdiction in the case of a collision far inland above tide water on a river connected to the sea, the court commenting:

> The admiralty jurisdiction surrendered by the States to the Union had no such bounds as exercised by themselves, and is clogged with no such conditions in its surrender.

Id. at 301.

The Daniel Ball, 10 Wall. 557 (1870), arose from a libel in admiralty of a steamer operating on Grand River within Michigan for violation of federal license and inspection laws enacted pursuant to the Commerce Clause. In holding Grand River to be navigable water of the United States the Court said:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And *they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the custom-

> ary modes in which such commerce is conducted by water.

Id. at 563, emphasis added.

In a case involving a similar libel, *The Montello*, 20 Wall. 430 (1874), the Court held the Fox River in Wisconsin navigable, although in its natural state its commerce had been interrupted by portages and obstructions. The Court said:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. *If it be capable in its natural state of being used for purposes of commerce*, no matter in what mode the commerce may be conducted, *it is navigable in fact*, and becomes in law a public river or highway . . .

Id. at 441-2, emphasis added.

In *Economy Light Co. v. United States*, 256 U.S. 113 (1921), the United States sued to enjoin defendant from building a dam in the Desplaines River, Illinois, alleging the river to be a navigable waterway of the United States, although, partly due to artificial obstructions, it had not been used for 100 years. Quoting the above language from *The Montello*, the Court held it to be navigable and added:

> We concur in the opinon of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the United States, is within the power of Congress to preserve for purposes of future transporation, *even though it be not at present used for such commerce, and be incapable of such use according to present methods*, either by reason of changed conditions or *because of artificial obstructions*. . . .

Id. at 123, emphasis added.

U.S. v. Appalachian Power Co., 311 U.S. 377 (1940), concerned the licensing of a dam. Holding that a waterway,

which can by reasonable improvement be made available for navigation, is a navigable waterway of the United States the Court said:

> In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole . . . The respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid authority of the Government over the stream. That authority is as broad as the needs of commerce . . .

Id. at 426.

Kaiser Aetna v. United States, 444 U.S. 164 (1979), concerned the navigational servitude and the question of compensation with respect to a "taking". In its opinion this Court pointed out the Government's position that Kaiser Aetna's improvment of Kuapa Pond made it part of the navigable water the United States, giving the public the right to use the pond without compensating Kaiser Aetna. *Id.* at 170. It was in this context that the Court observed:

> The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket . . . As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which

> the concept of 'navigability' was invoked in a particular case . . ."
>
> It is true that Kuapa Pond may fit within definitions of "navigability" articulated in past decisions of this Court. But it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude: for example . . . [a number of examples given].

Id. at 170-71, footnotes omitted. Thus the Court made the foregoing observations in order to differentiate the concept of navigability applicable to the navigational servitude from other concerns. We submit that it does not follow that definitions of navigability developed in each area of the law necessarily apply only to that area. As we have seen, this Court has not so confined itself. *Economy Light*, *supra*.

However, the Eighth Circuit did, in *Livingston v. United States*, 627 F. 2d 165, 169-170 (8th Cir. 1980), *cert denied*, 450 U.S. 914 (1981), coming to the conclusion that "a functional analysis" of "navigability" is required. We submit this is too narrow and fact-specific to serve as a proper test for admiralty jurisdiction and is inconsistent with the approach heretofore followed. *Livingston* further concluded:

> . . . Extensions of admiralty jurisdiction have followed the opening of new waters to commercial shipping. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453-54, 13 L.Ed. 1058 (1851). In our view, the closing of waters to *commercial shipping* should likewise have the effect of eliminating admiralty jurisdiction over them. In other words, the concept of "navigability" in admiralty is properly limited to describing a present capability of waters to sustain *commercial shipping*.

Id. at 169-170, footnote omitted, emphasis added.

The foregoing reads too much into the reasoning of *Genesee Chief* which was concerned with whether tide water was a requisite for admiralty jurisdiction in the context of constitutionality of an act of Congress. Moreover, it refers to closing the waters to commercial shipping and is thus not squarely applicable to *Three Buoys* inasmuch as the Lake of the Ozarks supports commercial traffic and in fact the collision herein involves a commercial service vessel. Moreover, *Livingston* supports its views by reference to *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975) and *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978) (*en banc*), *cert. denied*, 439 U.S. 893 (1978), both of which are grounded in lack of present or potential commercial shipping as barring admiralty jurisdiction, rather than cutting off interstate traffic which is *Three Buoys*' rationale. Thus, we submit, *Three Buoys*' true ground of decision on this point diverges from the grounds adopted by the other circuits.

On the subject of a necessity for interstate or foreign commerce for admiralty jurisdiction, the constitutional grant does not expressly require it, and we find no decision of this Court imposing it. Indeed, in *Ex parte Boyer*, 109 U.S. 629 (1884), which held an "interstate" canal within a state to be navigable water of the United States, the Court expressly reserved the point, saying:

> This case does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case.

Id. at 632. *And see Jackson v. Steamboat Magnolia*, *supra*.

Considering the above authorities, the clear federal interest in the Lake of the Ozarks, and its commercial traffic (including one of the colliding vessels), we respectfully submit that the Eighth Circuit clearly erred in denying admiralty jurisdiction in this matter.

B. Even if this collision on the Lake of the Ozarks does not otherwise fall within admiralty jurisdiction, a complaint seeking vessel owner's limitation of liability with respect thereto is within the district court's jurisdiction by virtue of the Limitation of Liability Act, authority for which is grounded in both the admiralty legislative power derived from the admiralty jurisdictional grant and the Commerce Clause.

Even if there were no admiralty and maritime jurisdiction under more general principles, there is jurisdiction by virtue of the complaint being brought under the Limitation of Liability Act, 46 U.S.C. §§ 183 *et seq*. Under § 185, the limitation proceeding is to be brought in a district court of the United States. (A-40)

Long before that part of § 185 was enacted this Court, in *Norwich Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871), pointed out that while the limitation act did not prescribe what court should be resorted to, no court was better adapted than a court of admiralty to administer such [limitation] relief, and went on to say:

> . . . . . It is evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding.

Id. at 123-24. In thereafter describing the proper course for pleading a limitation action in the District Court so as to effectively bar other actions in state courts, the Court said:

> The Court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to

> enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the District Courts, we have prepared some rules which will be announced at an early day.

Id. at 125. Those rules were duly issued as part of the admiralty rules and their current successor, Fed.R. Civ.P. Supplemental Admiralty Rule F, remains in effect. Since *Norwich* the courts have consistently held that limitation of liability proceedings are to be filed in the District Court.

As was said in *The Hamilton*, 207 U.S. 398 (1907):

> The power of Congress to legislate upon the subject [limitation of liability] has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to "all cases of admiralty and maritime jurisdiction." Art. 3, § 2; 130 U.S. 557.

Id. at 403-4.

In *Three Buoys* the Eighth Circuit referred to *Butler v. Boston Steamship Co.*, 130 U.S. 527, 555, 557 (1889), in reaching the conclusion that "courts have consistently limited the application of the Limitation of Liability Act to waters encompassed within the territorial domain of admiralty and maritime law." (A-20-21) However, the *Butler* quotations employed by the *Three Buoys* court were made by the *Butler* court not to demonstrate a territorial limitation as to applicability of the Limitation of Liability Act, but to show that it extended into state waters and took precedence over a state law which would have imposed unlimited liability, even though the stranding of the vessel occurred within state waters. Immediately after the last passage quoted in *Three Buoys*, the *Butler* court stated:

> The present case, therefore, is clearly within the admiralty and maritime jurisdiction . . . Though within a few rods of the island (which is a county of Massachusetts) and within the jaws of the headland, it was on the

> navigable waters of the United States, and no state legislation can prevent the full operation of the maritime law on those waters. *Id.* at 557.

We submit that, even without admiralty jurisdiction, by virtue of Congressional power to legislate with respect to waterways under the Commerce Clause and with respect to vessel owners under both the Commerce Clause and the admiralty jurisdiction grant, in this case involving a commercial vessel owner on waters clearly subject to the commerce legislative power (if not the admiralty), there is district court jurisdiction with respect to limitation of liability.

Both *Butler* and *Hamilton*, *supra*, were cases in which this Court held that claims not falling within general admiralty jurisdiction fell within a limitation proceeding. In *Hamilton* the Court said:

> . . . In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle . . . [citations omitted] . . . *but is the result of the statute, which provides for, as well as limits the liability and allows it to be proved against the fund.* The *Albert Dumois*, 177 U.S. 240, 260. See *Workman v. New York*, 179 U.S. 552, 563.

Id. at 406, emphasis added. As indicated in the italicized portion of the passage, a ground for bringing claims in the limitation proceeding is found in the statute, presumably R.S. § 4284, now § 184 (Appendix hereto), which provides for the owners of damaged property [including personal injuries or deaths, *Butler*, *supra*] receiving compensation from the limitation fund.

Thus, the Limitation of Liability Act not only gives a vessel owner a right to an injunction against commencement or

prosecution of actions outside the limitation proceeding, 46 U.S.C. § 185 (A-40) and Rule F(3) (A-43), but provides the injured party a valuable right to claim in the proceeding and obtain a *pro rata* share of the fund. 46 U.S.C.§ 184 (Appendix hereto). Accordingly, *Three Buoys*' discussion of federal question jurisdiction (A-16-18) is, we submit, largely beside the point.

Finally, in *Richardson v. Harmon*, 222 U.S. 96 (1911), this Court held that a vessel owner was entitled to seek limitation of liability with respect to a non-maritime tort, by virtue of what is now 46 U.S.C. § 189. Accordingly, on the authority of *Richardson,* even if the claims against Three Buoys are non-maritime torts, it is still entitled to seek limitation of liability, and the only court in which it may do so is the district court. *Richardson* plainly held that even though, but for the Limitation of Liability Act, there would have been no admiralty jurisdiction (the tort being non-maritime), the Act sufficed to put the case under district court jurisdiction in admiralty. The same principle applies here, even if there were no general admiralty jurisdiction.

In *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), a case involving an airplane crash in Lake Erie, which bore "no relationship to traditional maritime activity," *id.* at 273, this Court held:

> [I]n the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.

Id. at 274. The Court noted that the Death on the High Seas Act would be "legislation to the contrary" in an appropriate case. *Id.* n.26. Here the collision clearly involves traditional maritime activity, the issue being whether the status of the waters permits admiralty jurisdiction. Even if there were no "ordinary" admiralty jurisdiction, we respectfully submit that, particularly in these waters subject to federal legislative power (with federal navigation rules evidently applicable), the Limitation of Liability Act would be "legislation to the con-

trary'' which would bring the case within admiralty jurisdiction.

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: April 22, 1991

Respectfully submitted,

/s/ RICHARD H. BROWN, JR.
RICHARD H. BROWN, JR.
Counsel of Record
KENNETH H. VOLK
HARRY A. GOTIMER
KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Counsel for the Maritime Law Association of the United States, as Amicus Curiae

APPENDIX

APPENDIX

ADDITIONAL MATERIAL STATUTES

46 U.S.C. § 184. Apportionment of compensation

Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. [R.S. § 4284; Feb. 27, 1877, c. 69, § 1, 19 Stat. 251.]

46 U.S.C. § 189. Limitation of liability of owners of vessels for debts

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. [June 26, 1884, c. 121, § 18, 23 Stat. 57.]